

# **Exhibit USAbt-E**

GA Department of Community Health (Jerry Dubberly)

December 15, 2008

Atlanta, GA

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

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IN RE: PHARMACEUTICAL INDUSTRY )

AVERAGE WHOLESALE PRICE LITIGATION ) MDL No. 1456

-----) Civil Action

THIS DOCUMENT RELATES TO: ) No. 01-12257-PBS

United States of America, ex. rel. ) Hon. Patti Saris

Ven-a-Care of the Florida Keys, )

Inc., v. Abbott Laboratories, Inc., )

Civil Action No. 06-11337-PBS; and )

United States of America, ex. rel. ) VIDEOTAPED

Ven-a-Care of the Florida Keys, ) DEPOSITION OF

Inc., v. Dey, Inc., et. al., Civil ) THE GEORGIA

Action No. 05-11084-PBS; and United) DEPARTMENT OF

States of America, ex. rel. ) COMMUNITY HEALTH

Ven-a-Care of the Florida Keys, ) by JERRY

Inc., v. Boehringer Ingelheim ) DUBBERLY

Corp. et. al., Civil Action )

No. 07-10248-PBS. ) DECEMBER 15, 2008

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1 effort across those pharmacists.

2 Q. Would it have been possible for the  
3 pharmacy employees of the Georgia Medicaid  
4 program to perform the services that were  
5 delegated out to EDS, Express Scripts, or SXC?

6 A. No.

7 Q. Why not?

8 A. The enormity of administering the  
9 pharmacy benefit is something that requires a  
10 much larger group to -- to handle and systems and  
11 infrastructure and call centers and et cetera.  
12 So that's not something that we could do with  
13 that -- that number of staff.

14 Q. Are you generally familiar with the  
15 federal regulations regarding payments for  
16 prescription drugs?

17 A. I am.

18 (Whereupon a document was  
19 identified as Exhibit Georgia 002.)

20 Q. (By Mr. Lavine) Let me show you what  
21 we've premarked as Georgia Exhibit 2, which is a  
22 two-page document. On the top, it states:

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1       Federal Register/Volume 52, No. 147, dated July  
2       31, 1987.

3               I'll just ask you to take a quick look  
4       at that.

5               In particular, on the first page,  
6       there's section 447.331, subparagraph b.

7               Do you see where there's two -- two  
8       parts to subsection b there?

9               Item one states -- I should go back a  
10      little bit.

11               The, "Payment levels that the agency  
12      has determined by applying the lower of the --  
13      (1) Estimated acquisition costs plus reasonable  
14      dispensing fees established by the agency; or (2)  
15      Providers' usual and customary charges to the  
16      general public."

17               Are you generally familiar with that  
18      language?

19               A.    I am.

20               Q.    And has the Georgia Medicaid program  
21      established a reimbursement methodology that  
22      applies to those requirements?

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1 A. Yes, we have.

2 Q. Can you just explain that a little bit.

3 A. The requirement is that the agency  
4 develop their best estimate of the price  
5 generally and currently paid by providers, as you  
6 see.

7 We have a mechanism in place where the  
8 reimbursement is the lower of or lesser of our  
9 estimated acquisition cost, which is AWP minus 11  
10 percent currently, or the providers' usual and  
11 customary cost or the providers' submitted  
12 ingredient cost plus their dispensing fee, or the  
13 federal MAC or the state MAC or the -- or the  
14 providers' most favored nation, or MFN, rate.

15 Then a dispensing fee applies for those  
16 -- for, you know, each of those as well.

17 Q. Can you take a look also on -- on  
18 Exhibit 2 -- I'm sorry -- yes.

19 Is that 2?

20 A. Yes.

21 Q. Exhibit 2, 447.301, the definition of  
22 "estimated acquisition cost."

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1 A. Okay.

2 Q. "'Estimated acquisition cost' means the  
3 agency's best estimate of the price generally and  
4 currently paid by providers for a drug marketed  
5 or sold by a particular manufacturer," do you see  
6 that language?

7 A. I do.

8 Q. Has the Georgia Medicaid program also  
9 attempted to determine estimated acquisition  
10 costs in accordance with that definition?

11 A. We have.

12 Q. And that's consistent with the -- the  
13 general approach you described just a moment ago?

14 A. It is.

15 Q. In order to qualify for federal  
16 Medicaid funding, does your state need to have a  
17 state plan that's approved by the federal  
18 government?

19 A. Yes, we do.

20 Q. Does that get amended from time to  
21 time?

22 A. It does.

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1 Q. Is it feasible to just set  
2 reimbursement for all NDCs at AWP minus 65  
3 percent?

4 A. No. The MAC rate typically applies to  
5 generics, and generics are typically based upon  
6 pricing studies that some of the government  
7 entities have done. There's a wider margin  
8 between the published AWP and the actual  
9 acquisition cost for those drugs.

10 (Whereupon a document was  
11 identified as Exhibit Georgia 014.)

12 Q. (By Mr. Lavine) I just marked as  
13 Exhibit 14 a two-page document. It reflects at  
14 the top "Department of Health and Human Services"  
15 with a date of April 12th, 1994, with a document  
16 number at the lower right-hand side of HHC902-  
17 0878.

18 I'll just ask you to take a look at  
19 that and then tell me if you recognize that  
20 document.

21 A. I have seen it before.

22 Q. Can you take a look at the next-to-last

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1 paragraph on page 2 starting with, We would also  
2 clarify our policy that a dispensing fee  
3 determination must be separate and distinct from  
4 the estimated acquisition cost determination --

5 A. Yes.

6 Q. -- and unrelated to the cost of the  
7 drug product.

8 A. Yes.

9 Q. Is -- is the state plan for Georgia  
10 Medicaid program consistent with that statement?

11 MR. COLE: Object to the form.

12 A. The acquisition cost and the dispensing  
13 fee are separately approved by CMS and our state  
14 plan.

15 Q. (By Mr. Lavine) And does Georgia also  
16 have a policy known as a "most favored nation"  
17 regarding -- that applies to dispensing fees?

18 A. We do.

19 Q. Can you explain that.

20 A. The most favored nation requirement is  
21 that a pharmacy must pass along to the department  
22 the lowest reimbursement methodology that it

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1       \$283.20. Do you see that?

2           A. Yes.

3           Q. And then the price available to at  
4 least some pharmacists was \$25.56. Do you see  
5 that?

6           A. Yes.

7                    MR. REALE: Objection.

8           BY MS. FORD:

9           Q. And the estimated dollar value of the  
10 spread was \$257.69, with a spread percentage of  
11 over 1000%. Do you see that?

12           A. I see that.

13           Q. And would Washington Medicaid have  
14 expected manufacturers to provide information to  
15 pricing compendia that would reflect that large  
16 of a spread between the price available to  
17 providers and the price, the AWP price?

18           A. No.

19                    MS. RAMSEY: Objection.

20           BY MS. FORD:

21           Q. Prior to learning of the lawsuits which  
22 we're taking your deposition in today, did

Olympia, WA

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1 Washington become aware -- Washington Medicaid  
2 become aware of differences between the Average  
3 Wholesale Price and the price at which providers  
4 in Washington State were actually paying for  
5 drugs?

6 A. I can't speak for other people, but  
7 certainly we have heard about -- about the, you  
8 know, allegations that there were price  
9 discrepancies or that there was this inflation or  
10 artificial inflation of prices.

11 Q. And did you or did Washington State  
12 have any understanding of the -- the amount of  
13 that inflation?

14 A. No.

15 Q. Did Washington Medicaid intend for  
16 providers to be able to make a profit between the  
17 difference on reimbursement for a drug and what  
18 they were actually paying for a drug?

19 A. I can't say that we intended to. We  
20 certainly I would think rec -- recognized that  
21 there's usually a profit factor in what some  
22 people, you know, what providers and suppliers in

Atlanta, GA

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1 A. Not at all.

2 MR. ROBBEN: Object to the form.

3 Q. (By Mr. Lavine) How did it come about,  
4 then, that the dispensing fee -- well, clarify  
5 for me what -- what you were saying before.

6 A. The -- the charge to the Medicaid  
7 agency is to estimate, to the best of its  
8 ability, the actual acquisition cost of the drug  
9 or the estimated acquisition of a cost and pay a  
10 fair dispensing fee.

11 Knowing that there is no source other  
12 than each individual's -- provider's invoice of  
13 what the acquisition cost of a drug is, the  
14 department has used average wholesale price and a  
15 discounted rate off of that to approximate some  
16 form of estimated acquisition cost.

17 There -- the dispensing fees are  
18 reflective of -- of the effect of not having that  
19 actual acquisition cost in that they are  
20 artificially lower than what it actually costs to  
21 dispense a drug, again because there's margin in  
22 the ingredient cost.

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1 Q. So in part, it's a side effect of the  
2 spread between AWP and actual cost?

3 MR. COLE: Object to the form.

4 A. Yes, it is.

5 Q. (By Mr. Lavine) Now, the state plan  
6 for Georgia -- let me ask you to look at Exhibit  
7 3.

8 Am I correct that the state plan  
9 provides that the dispensing fee is based upon  
10 periodic surveys of pharmacy operating costs  
11 including professional salaries and fees,  
12 overhead costs, and reasonable profit?

13 A. Yes. That is correct.

14 Q. And in general, that was the policy of  
15 the Georgia Medicaid program?

16 A. Yes.

17 Q. And is it your expectation that CMS  
18 would have approved a divergence from that  
19 policy?

20 A. No.

21 MR. ROBBEN: Object to the form.

22 MR. COLE: Object to the form.

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1 Q. (By Mr. Lavine) Do you remember  
2 Exhibit 14 -- or can you pull out Exhibit 14,  
3 please.

4 The very -- the next-to-last paragraph,  
5 "We would also clarify our policy that a  
6 dispensing fee determination must be separate and  
7 distinct from the EAC determination and unrelated  
8 to the cost of the drug product."

9 Has it been the understanding of the  
10 Georgia Medicaid program that that is the  
11 directive of the federal -- the federal program  
12 that runs Medicaid?

13 A. Yes.

14 MR. COLE: Object to the form.

15 A. Yes.

16 MR. LAVINE: Let me just mark two more  
17 exhibits real quick.

18 MR. COLE: Was there an answer to the  
19 last question?

20 THE COURT REPORTER: It was, "Yes."

21 MR. COLE: Thank you.

22 (Whereupon a document was

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1 identified as Exhibit Georgia 034.)

2 MR. ROBBEN: What number is the first  
3 one?

4 MS. TOWNES: 34.

5 MR. ROBBEN: Thank you.

6 Q. (By Mr. Lavine) We just marked as  
7 Exhibit 34 a two-page document on the letterhead  
8 of the Department of Health and Human Services  
9 dated November 30th, 1993, directed to Russell  
10 Toal, commissioner, Georgia Department of Medical  
11 Assistance.

12 And although there's no actual  
13 signature there, it reflects that it was sent by  
14 Eugene Grassner.

15 MR. ROBBEN: Mr. Lavine, could you  
16 clarify where this document is from. Is it -- is  
17 it from the U.S. production or Florida  
18 production? It doesn't have a Bates number on  
19 it.

20 MR. LAVINE: It's from the Georgia  
21 production.

22 MR. ROBBEN: From the Georgia? Thank

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1 MR. ROBBEN: Object to the form.

2 MR. COLE: Object to the form.

3 A. Yes. The practice is frowned upon by  
4 CMS. However, subsequent state plans have been  
5 approved that do the same thing.

6 Q. (By Mr. Lavine) Is there --

7 MR. COLE: I'm sorry. Could I have  
8 that answer read back, please.

9 (The record was read by the  
10 reporter.)

11 MR. COLE: Thank you.

12 Q. (By Mr. Lavine) You're referring to  
13 the particular situation in Exhibit 34 that  
14 describes that a -- a dispensing fee based upon  
15 the ingredient as a percentage of the ingredient  
16 cost?

17 A. No.

18 Q. What do you mean?

19 A. Subsequent state plans, for example,  
20 moving the reimbursement to AWP minus 11 percent  
21 plus the 4.63 --

22 Q. Is there a provision in the state plan

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1 that specifies that the ingredient cost is higher  
2 than it otherwise would be --

3 A. No.

4 Q. -- and, therefore, the dispensing fee  
5 is lower than it would be?

6 MR. ROBBEN: Object to the form.

7 A. No.

8 MR. COLE: Object to form.

9 A. No.

10 Q. (By Mr. Lavine) That's not something  
11 that would be approved by CMS, is it?

12 MR. ROBBEN: Object to the form.

13 MR. COLE: Object to the form.

14 A. Can you clarify what the question is  
15 again.

16 Q. (By Mr. Lavine) If -- if the State of  
17 Georgia explained to CMS that it wanted to  
18 implement a policy of purposely overpaying  
19 ingredient costs so that it could underpay the  
20 dispensing fee, would you expect that to be  
21 approved by CMS?

22 MR. ROBBEN: Object to the form.

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1 MR. COLE: Object to the form.

2 A. No.

3 Q. (By Mr. Lavine) Georgia -- Georgia's  
4 Medicaid program understands that a directive  
5 from the federal end of the Medicaid program was  
6 to keep those two items separate.

7 MR. COLE: Object to the form.

8 A. Yes.

9 Q. (By Mr. Lavine) Look at Exhibit 18  
10 quickly. It's the Deloitte & Touche exhibit.  
11 Look at page 8.

12 The average total cost to dispense a  
13 prescription in the state of Georgia at a 95  
14 percent confidence rate is \$5.01 plus or minus 44  
15 cents.

16 So would you agree that that would lead  
17 to a dispensing fee of between \$5.45 and -- I  
18 need to do the math so I get it right -- \$4.77?

19 MR. ROBBEN: Object to the form.

20 Q. (By Mr. Lavine) Did I get my math  
21 wrong?

22 A. I'm very tired, but I think it's 4.57.

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1 Q. I think you're right.

2 So the Deloitte & Touche report  
3 commissioned by the Georgia Department of Health  
4 dated June 30th, 2000 concluded that the average  
5 cost to dispense a prescription in the state of  
6 Georgia is between \$4.50 and \$5.45.

7 Would you agree with that?

8 A. Yes.

9 Q. And what was the actual dispensing fee  
10 in the state of Georgia at that time?

11 And Exhibit 4 might be a good  
12 reference.

13 A. \$4.63 and \$4.33.

14 Q. Would you agree that there is not a  
15 substantial difference between the actual  
16 dispensing fee and the results of the Deloitte  
17 study?

18 MR. ROBBEN: Object to the form.

19 MR. COLE: Object to the form.

20 A. There's not a substantial difference,  
21 in my opinion.

22 Q. (By Mr. Lavine) Can you look at

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1 MR. COLE: Object to the form.

2 A. I do not.

3 Q. (By Mr. Lavine) And the -- and you  
4 talked about the State of Georgia having  
5 knowledge about there being discounts from --  
6 between the AWP and the actual acquisition cost.

7 Do you remember that?

8 A. Yes.

9 Q. And you agree that that's information  
10 that over the years came into the -- or was that  
11 information that was accumulated by the State of  
12 Georgia over the years?

13 MR. ROBBEN: Object to the form.

14 A. Yes.

15 Q. (By Mr. Lavine) I mean, slowly it  
16 picked up more and more information about the  
17 details of the spread; is that right?

18 MR. ROBBEN: Object to the form.

19 A. Yes.

20 Q. (By Mr. Lavine) Are you aware of any  
21 information about the size of the spread and a  
22 reason that some spreads continue to get larger

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1 on the part of the State of Georgia being derived  
2 from any kind of a disclosure from a drug  
3 company?

4 MR. ROBBEN: Object to the form.

5 A. No.

6 Q. (By Mr. Lavine) So it's information  
7 that the State of Georgia figured out on its own?

8 A. Yes, and in conjunction with  
9 conversations with other payers in the industry.

10 Q. But not because any drug company came  
11 to the State of Georgia and explained any of this  
12 information?

13 A. No.

14 MR. ROBBEN: Object to the form.

15 Q. (By Mr. Lavine) Can you look at  
16 Exhibit 13 quickly, please. That's the one with  
17 the prices of some of the Dey products followed  
18 by a paragraph stating, "the AWP listed here does  
19 not represent any actual price."

20 A. Yes.

21 Q. Do you remember that exhibit?

22 A. Yes.

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